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SUMMARY RECORD OF THE 479th MEETING

Held at Headquarters, New York,
on Tuesday, 12 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

Draft legal guide on international countertrade transactions (continued)

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The meeting was called to order at 10.10 a.m.

DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS (continued) (A/CN.9/362 and Add.1-18; A/CN.9/XXV/CRP.3 and 4)

Chapter XIV (continued) (A/CN.9/362/Add.14)

1. The CHAIRMAN recalled that there had been a difference of opinion on the preceding day with regard to paragraph 5, referring to the selection of the applicable law. The representatives of Canada and Egypt and the observer for Finland had undertaken to try to draft a generally acceptable text.

2. Ms. BUURE-HAGGLUND (Observer for Finland) read out the new wording of the second sentence of paragraph 5: "For example, most States do not allow the freedom of choice with respect to the questions of the transfer of ownership of goods or the disposition of funds held in a bank."

3. The amendment was approved.

4. Mr. BONELL (Italy) said that with the new wording, the Commission had changed the emphasis of paragraph 5 to reflect more closely the actual state of affairs. He felt that a similar change should be made in the first sentence of paragraph 2, where "many national laws" should become "most national laws".

5. Ms. BUURE-HAGGLUND (Observer for Finland) said that she understood the Commission had already decided to amend paragraph 2 as the representative of Italy had just proposed, but she wished to propose a more extensive change. The intricacies of private international law were not well understood, even by many lawyers. In the interests of making paragraph 2 clearer, she suggested the following wording:

> "Under the rules of private international law (in some legal systems referred to as 'conflict of laws' or 'choice of law' rules) of most jurisdictions the parties are permitted by agreement to choose the applicable law. Under some laws there are, however, certain restrictions on that choice. If the parties do not choose the applicable law, the private international law rules of the forum will determine which law governs the legal relationship."

6. The amendment was approved.

7. Mr. DUCHEK (Austria) said that he had a comment on the second sentence of paragraph 15, dealing with situations in which parties agreed that their transaction would be governed not by a national law, but by some other set of rules. Under that paragraph, in those States which did not permit such an option, the national law would apply, with the other rules applying in so far as they did not contravene the mandatory provisions of the applicable national law. However, that was not necessarily the case. There were two

(Mr. Duchek, Austria)

possibilities: while some States might forbid the option entirely, others might permit the application of those portions of the selected other set of rules which were not in conflict with the mandatory rules of the national law. He suggested that the second sentence should be amended to make it clear that either of those possibilities might exist.

8. Mr. AZZIMANE (Morocco) pointed out that paragraph 9 said that an express choice of the applicable law was advisable, and paragraph 10 described the possible consequences if that express choice were not made. Therefore, the phrase "unless the parties have chosen the applicable law" in the sixth sentence of paragraph 10 was redundant, because the whole paragraph relied on the hypothesis that that choice had not been made.

9. Mr. BONELL (Italy) said that the wording of the penultimate sentence of paragraph 10 was misleading. It seemed to imply that, given two possible decisions as to the applicable law, an arbitral tribunal was just as likely to make one decision as the other. The sentence should be reworded to give more emphasis to the first choice, which was the one envisaged in the UNCITRAL Model Law on International Commercial Arbitration, while the second was provided for, as far as he was aware, only in the legislation of France.

10. Mr. LEVY (Canada) recalled that the Commission was not drafting a text on arbitration or conflict of laws, but on countertrade. The discussion was penetrating too deep into other complex issues, which could be avoided simply by deleting part of paragraph 2.

11. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) suggested that the last sentence of paragraph 10 should be retained, since its intention was to bring to light the difficulties which might arise if an express choice of applicable law were not made.

12. Ms. BUURE-HAGGLUND (Observer for Finland) recalled that the Commission had taken a decision not to deal with general questions not specifically applicable to countertrade. She therefore supported deletion of the penultimate sentence of paragraph 10 and retention of the last one.

13. Mr. BONELL (Italy) said that he also supported deletion of the penultimate sentence of paragraph 10 and retention of the last one.

14. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the choice-of-law clause described in paragraph 16 virtually never applied in matters of contract law, although it might in other branches of law. He suggested that the opening words of the paragraph "In many national laws" should be changed to "In most national laws".

15. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) referred to the fourth sentence of paragraph 12, and suggested that "under other systems" should be amended to "under most systems".

16. Chapter XIV, as amended, was approved.

Chapter XV (A/CN.9/362/Add.15)

17. Mr. AZZIMANE (Morocco) said that the description, in paragraph 2, of the arbitrators as "impartial" implied that other types of legal proceedings were less impartial. He proposed that the word "impartial" should be deleted.

18. The proposal was approved.

19. Mr. AZZIMANE (Morocco) proposed that "in general" should be deleted from the first sentence of paragraph 18.

20. The proposal was approved.

21. Mr. GRIFFITH (Observer for Australia) said he regretted that the Commission had not made a stronger case in the draft Legal Guide in favour of the UNCITRAL Arbitration Rules, which could provide useful guidance on many arbitration-related issues. Consideration might be given to the inclusion in the text of a general paragraph recommending the Rules.

22. The CHAIRMAN suggested that the secretariat should be requested to redraft paragraph 29 in order to place greater emphasis on the Rules.

23. It was so decided.

24. Mr. LEVY (Canada) said that an arbitral tribunal did not have the power to enforce a remedy of specific performance. The word "grant" in the antepenultimate sentence of paragraph 16 should therefore be replaced by a more muted term, such as "award".

25. It was so decided.

26. Mr. LEVY (Canada) suggested the addition of the words "as such" after the word "enforceable" in the second sentence of paragraph 21, since an arbitral award was in fact enforceable if an action was brought for its enforcement as a contract.

27. It was so decided.

28. Mr. LEVY (Canada), referring to paragraphs 36 and 37, said that the Guide should place greater emphasis on the work of the United Nations, in general, and of UNCITRAL, in particular. It should also mention as desirable places of arbitration those countries which had ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Lastly, it should indicate that States which had enacted the UNCITRAL Model Law on International Commercial Arbitration did not require reciprocity, since the relevant provisions of the Model Law did not provide for the option of reciprocity permitted by the reservations clause in the 1958 Convention.

29. Mr. BONELL (Italy) said while he hoped that the Model Law would indeed find broad international acceptance, he would not go as far as to recommend as places of arbitration those States which had ratified it.

30. The CHAIRMAN recalled that the Working Group had been guided by the principle that it should not make provisions on questions outside the scope of countertrade. The last proposal of the representative of Canada could not therefore be accepted.

31. Mr. EL-SHARKAWY (Egypt) said that the Guide should provide for situations in which the parties included in their contract a clause on international arbitration, while, at the same time, the legislation of the State of one of the parties granted exclusive competence to the national jurisdiction. He suggested the inclusion of a new paragraph that would recommend that parties to countertrade contracts should be bound by arbitral agreements regardless of provisions in national law concerning jurisdiction.

32. The CHAIRMAN said that the Guide would only facilitate the preparation of contracts in which the parties themselves stipulated their rights and obligations. It could not of itself create rights and obligations.

33. Mr. EL-SHARKAWY (Egypt) said that the point of his suggestion was to ensure respect for the intention of the parties. The reference to national law might even be deleted.

34. Mr. BONELL (Italy) said that the Guide should alert parties to the possible existence of mandatory national rules, which would prevent them from selecting their own place of arbitration.

35. Chapter XV, as amended, was approved.

Chapter XVI (A/CN.9/362/Add.16)

36. Mr. BONELL (Italy), referring to paragraph (1) of the footnote to paragraph 21 of chapter XIII (A/CN.9/362/Add.16, p. 7), said that the words "physical or legal" did not appear in article 79 of the United Nations Sales Convention and should therefore be deleted.

37. It was so decided.

38. Chapter XVI, as amended, was approved.

Chapter summaries (A/CN.9/362/Add.17)

39. Ms. BUURE-HAGGLUND (Observer for Finland) said that the secretariat should ensure that the chapter summaries conformed to the wording of the decisions taken by the Commission on the draft Legal Guide.

40. The chapter summaries were approved.

Draft resolution on the draft Legal Guide (A/CN.9/XXV/CRP.3)

41. Mr. PFUND (United States of America) drew attention to the need to ensure that adequate publicity was given to the publication of the Guide.

42. Mr. LEVY (Canada) said that the Guide would be a useful document and should be published as soon as possible in a readable format. It was also important, as the United States representative had said, that it should be publicized adequately.

43. Mr. HERRMANN (Secretary of the Commission) assured the Commission that the Secretariat was aware of the need to publicize the Guide effectively; it would do its best to persuade the competent section of the Secretariat to make greater efforts to that end. He pointed out that delegations and Governments could also help to ensure greater awareness of the Guide on the part of its potential users.

44. Mrs. AUGIER (France) suggested that the word "involved" in the third preambular paragraph of the draft resolution should be translated in the French text as "qui effectuent".

45. Mr. MBURI (United Republic of Tanzania) said that the phrase "while being conscious that countertrade may have certain disadvantages" in the second preambular paragraph had a negative connotation and should be deleted.

46. Mr. BONELL (Italy) supported that suggestion. There was no need for the Commission to enter into the merits or demerits of the transactions in question.

47. Mr. PFUND (United States of America), Mr. HUNJA (Kenya), Ms. BUURE-HAGGLUND (Observer for Finland) and Mr. GRIFFITH (Observer for Australia) supported the suggestion.

48. Mr. CHATURVEDI (India) said that he also supported the Tanzanian suggestion. At the same time, he was grateful to the Secretariat for the timely completion of the draft Legal Guide, which was of great importance for the developing countries and represented an important contribution to the work of the Commission.

49. The Tanzanian suggestion was adopted.

50. Mr. ALVAREZ (Uruguay) suggested that, in paragraph 2 of the draft resolution, the word "persons" should be replaced by less colloquial wording, such as "all entities and individuals".

51. Mr. CHATURVEDI (India) said that he preferred the retention of the word "persons", at least in the English text.

52. The CHAIRMAN suggested that the entire phrase "to persons involved" should be deleted.

53. It was so decided.

54. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) pointed out that the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works had included a sentence asking the public to communicate any comments or suggestions concerning that Guide to the Secretariat. A similar sentence might be added to the Guide on International Countertrade Transactions.

55. Mr. LEVY (Canada) asked whether the Secretariat had in fact received any comments from the public concerning the Guide on construction contracts.

56. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that some comments had been made in publications.

57. The CHAIRMAN said he took it that the Commission agreed to add a sentence along the lines suggested by the representative of the International Trade Law Branch.

58. It was so decided.

59. The draft resolution, as amended, was adopted.

The meeting rose at 1.05 p.m.